Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

October Term, 1996

KYLE SHILDMYER,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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44 pp

## QUESTION PRESENTED FOR REVIEW

The question presented for review is:

Whether an Assistant United States Attorney has the delegated authority to revoke, or otherwise terminate, an Application for Automatic Extension of Time to File U.S. Individual Income Tax Return, IRS Form 4868, when said Application has been previously accepted by the Internal Revenue Service, the only governmental entity authorized to process such Applications.

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## CITATIONS OF THE OFFICIAL REPORTS ENTERED BY THE COURTS IN THIS CASE

i) Denial of Petition for Rehearing, *United States v. Shildmyer*, No. 96-30222 (9th Cir., June 16, 1997).

ii) Memorandum Decision (unpublished), *United States v. Shildmyer*, No. 96-30222 (9th Cir., April 24, 1997).

iii) Memorandum Decision and Order, *United States v. Shildmyer*, Crim. No. 95-097-S-BLW (Dist. of Idaho, February 6, 1996).

## BASIS FOR U.S. SUPREME COURT JURISDICTION

i) On April 24, 1997, the Ninth Circuit Court of Appeals entered the Memorandum Decision that Petitioner Kyle Shildmyer requests this Court to review.

ii) On June 16, 1997, the Ninth Circuit Court of Appeals entered its Order denying the Petition for Rehearing.

iii) Section 1254(1) of Title 28 of the United States Code confers jurisdiction upon this Court to review the Memorandum Decision rendered by the Ninth Circuit Court of Appeals.

## STATUTES AND REGULATIONS

i) 28 U.S.C. 547 (West 1993) provides:

> Except as otherwise provided by law, each United States Attorney within his district, shall: (1) prosecute for all offenses against the United

States; (2) prosecute or defend, for the Government, all civil actions, suits, or proceedings in which the United States is concerned; (3) appear in behalf of the defendants in all civil actions, suits or proceedings pending in his district court against collectors, or other officers of the revenue or customs for any act done by them or for the recovery of any money exacted by or paid to these officers, and by them paid into the Treasury; (4) institute and prosecute proceedings for the collection of fines, penalties, and forfeitures incurred for violation of any revenue law, unless satisfied on investigation that justice does not require the proceedings; and (5) make such reports as the Attorney General may direct.

ii) 26 U.S.C. § 6081(a) (RIA 1997) provides:

"The Secretary may grant a reasonable extension of time for filing any return, declaration, statement, or other document required by this title or by regulations. Except in the case of taxpayers who are abroad, no such extension shall be more than 6 months."

iii) Treasury Regulation § 1.6081-4(c) (RIA 1997) provides:

"The district director, including the Assistant Commissioner (International), or the director of a service center may terminate at any time an automatic extension by mailing to the taxpayer a notice of termination. The notice must be mailed at least 10 days prior to the termination date designated in such notice. The notice of termination must be mailed to the taxpayer at the

address shown on Form 4868 or to the taxpayer's last known address."

## STATEMENT OF THE CASE

### A) FACTS MATERIAL TO CONSIDERATION OF THE QUESTION PRESENTED

Petitioner Kyle Shildmyer's 1988 federal income tax return was originally due on April 15, 1989. On April 14, 1989, Petitioner filed an Application for Automatic Extension of Time to File U.S. Individual Income Tax Return, IRS Form 4868, ("Application for Extension"). The Application was accepted by the Internal Revenue Service ("Service"). This Application for Extension required Petitioner to file his return on or before October 15, 1989. Because October 15, 1989, fell on a Sunday, Petitioner's filing date was automatically extended to October 16, 1989. The Service physically received Petitioner's return on October 18, 1989. Six years to the day, on October 18, 1995, the Grand Jury returned a Five Count Indictment against Petitioner alleging that Petitioner willfully made and subscribed a U.S. Individual Tax Return for several calendar years, including 1988.

On January 2, 1996, Petitioner filed a Motion to Dismiss and supporting Memorandum arguing that Count One of the Indictment was barred by the statute of limitations. (Document No. 6 of Appendix). Specifically, Petitioner argued that, pursuant to certain provisions of the Internal Revenue Code, the 1988 return was deemed delivered on the date of mailing, October 16, 1989, and, therefore, the Indictment handed down on October 18,

1989, was 2 days past the controlling 6 year statute of limitations. *Id.*

On January 12, 1996, the Assistant U.S. Attorney for the District of Idaho filed a response to Petitioner's Motion to Dismiss and argued that Petitioner's Application for Extension was invalid. (Document No. 5 of Appendix). At no point in time prior to January 12, 1996, did the Service revoke or terminate its prior acceptance of Petitioner's Application for Extension.

Pursuant to a Rule 11(a)(2) Plea Agreement, Petitioner pled guilty to Count One of the Indictment involving the 1989 tax year and all other Counts were dismissed. (Document No. 4 of Appendix). The Plea Agreement specifically reserved Petitioner's right to appeal the denial of his Motion to Dismiss.

## B) BASIS FOR FEDERAL COURT JURISDICTION IN THE FIRST INSTANCE

The Federal District Court for the State of Idaho had jurisdiction as a result of the Grand Jury Indictment charging Petitioner with one violation of Title 26, United States Code, Section 7206(1), and Title 18, United States Code, Section 2, and four violations of Title 26, United States Code, Section 7206(1).

## ARGUMENT

In his Appeal and Petition for Rehearing Petitioner raised the issue that, once the District Court found that the Service had accepted Petitioner's Application for

Extension, some affirmative act was required by the Service to revoke or otherwise terminate such acceptance. Petitioner, in his Petition for Rehearing, also argued that any analysis of applicable statute of limitations must come after a determination that the accepted Application for Extension had been revoked or terminated. Petitioner further argued that the handling Assistant U.S. Attorney's response to Petitioner's Motion to Dismiss did not constitute such a revocation or termination.

The Ninth Circuit failed to either address Petitioner's arguments or proffer an explanation as to why it failed to do so. Instead, the Ninth Circuit simply adopted the District Court's factual determinations, denied Petitioner's appeal and held that Petitioner's Application for Extension was not entirely segregable for the issue of his alleged guilt under the charged crime because both involve inquiry into the extent of Petitioner's tax liability. Page 5 of Memorandum Decision (unpublished), *United States v. Shildmyer*, No. 96-30222 (9th Cir., April 24, 1997). The Ninth Circuit also wrote that Petitioner had not raised the argument that a statute of limitations prevented the government from questioning the validity of the extension. While this statement does not address the threshold issue, it does reveal that the Ninth Circuit acknowledged that some type of revocation did occur. Otherwise, the Ninth Circuit's discussion regarding a statute of limitations barring such revocation would be superfluous.

Consequently, the Ninth Circuit's decision stands for the proposition that although the Service alone has the delegated authority to process Applications for Extensions, any other unrelated federal agency/employee can

revoke an Application for Extension that the Service has previously accepted even though such unrelated federal agency/employee does not have the delegated authority to do so. Such a holding is incorrect and has wide ranging ramifications for both the Service and taxpayers in general.

## A) THE INTERNAL REVENUE SERVICE IS THE ONLY GOVERNMENTAL ENTITY AUTHORIZED TO PROCESS APPLICATIONS FOR EXTENSION

Federal law clearly states that Applications for Extension are within the sole province and domain of the Service. Federal law does not authorize an Assistant U.S. Attorney, or any other governmental entity, to process Applications for Extension. And, the Service has not delegated its authority regarding the processing of Applications for Extension to the United States Attorneys or their Assistants.

A United States Attorney is appointed for each judicial district. 28 U.S.C. § 541(a) (West 1993). The Attorney General is authorized to appoint one or more assistant United States attorneys. 28 U.S.C. § 542(a) (West 1993). The applicable duties involve prosecuting all offenses against the United States and prosecuting, and defending all civil actions involving the United States; the duties do not include administration, including processing of Applications for Extension, of the internal revenue laws of the United States. 28 U.S.C. § 547 (West 1993).

The Service is the only governmental entity authorized to process Applications for Extension. Title 26, United States Code, Section 6081 authorizes the Secretary

to grant Applications for Extension. The term "Secretary" means the Secretary of Treasury or his delegate. 26 U.S.C. § 7701(a)(11)(B) (RIA 1997). The term "or his delegate" does not include the Attorney General's Office or a United States Attorney; it does include directors of Internal Revenue Service Centers. See for example 26 U.S.C. § 7701(a)(12)(A) (RIA 1997). In turn, Treasury Regulation § 1.6081-4(c) (RIA 1997) allows the Assistant Commissioner or the director of a service center to terminate an automatic extension upon 10 days' prior written notice. The Regulation does not authorize any other governmental entity to terminate such an automatic extension.

Therefore, since the Assistant U.S. Attorney involved in this case did not have the delegated authority to revoke, or otherwise terminate, Petitioner's Application for Extension, such purported action is void and Petitioner's Application stands. See for example *Simon v. Marlow*, 515 F.Supp. 947, 948-949 (W.D. Virginia 1981). Consequently, the Ninth Circuit should have addressed Petitioner's argument in this regard, reversed the Memorandum Decision of the District Court, and remanded the case with instructions to dismiss Count One of the Indictment.

## B) THE IMPORTANCE OF THIS COURT GRANTING REVIEW

It is important for this Court to review the Ninth Circuit's decision for several reasons. Initially, if the Assistant U.S. Attorney did not have the delegated authority to revoke Petitioner's Application for Extension, then it remained in effect. In turn, then, Count One

of the Indictment would have been barred by the applicable statute of limitations and should have been dismissed by the District Court.

Secondly and perhaps more importantly, there is no reported decision by this Court, or any other Circuit Court of Appeals, addressing the processing, including acceptance, revocation or applicable statute of limitations, of Applications for Extension. Consequently, the Ninth Circuit's decision controls and impacts all Applications for Extension filed with the Service. Such decision has far reaching implications for both the Service and all individual taxpayers filing Applications for Extension.

According to published Internal Revenue Service statistics, there were 5,890,500 Applications for Extension filed in 1995, an estimated 6,346,800 Applications for Extension will be filed for tax year 1996, a projected 6,434,700 Applications for Extension will be filed for tax year 1997 and a projected 6,520,100 Applications will be filed for tax year 1998. These numbers represent Applications for Extension filed by only individual taxpayers and do not include Applications for Extension filed by corporations, partnerships or other entities. If the Ninth Circuit decision stands, then each and every one of these Applications stands the risk of being revoked or terminated by an unknown governmental entity unauthorized to process Applications for Extension. Furthermore, such revocation could occur, as in this case, well beyond 6 years.

## CONCLUSION

With the increasing number of Applications for Extension being filed, it is important for this Court to review the Ninth Circuit's decision. In ultimately rendering a decision, whether in favor of or against Petitioner, such a decision by this Court will provide clear guidance on the processing, including acceptance, termination and applicable statute of limitations, of Applications for Extension. As a result, taxpayers, the Service and the administration of the internal revenue laws of the United States will benefit from such guidance.

Respectfully submitted this 15th day of September 1997.

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## APPENDIX

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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|---|---|
| UNITED STATES OF AMERICA, Plaintiff-Appellee, v. KYLE SHILDMYER, Defendant-Appellant. | No. 96-30222<br>D.C. No. CR-95-097-BLW<br>MEMORANDUM*<br>(Filed Apr. 24, 1997) |

Appeal from the United States District Court
for the District of Idaho
B. Lynn Winmill, District Judge, Presiding

Argued and Submitted April 9, 1997
Seattle, Washington

Before: WRIGHT, REINHARDT, and THOMAS, Circuit Judges.

Defendant Kyle Shildmyer, accused of filing a false tax return, filed a motion to dismiss on the ground that the statute of limitations had run. Resolution of this issue depends upon whether Shildmyer had properly filed an application for an automatic extension. This determination, in turn, depends upon whether Shildmyer's application was a "bona fide and reasonable estimate of his tax liability." The district judge held that whether Shildmyer had properly filed a petition for automatic extension was

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

a fact determination for the jury to make, although he invited Shildmyer to renew his motion at the close of the government's case in chief. Shildmyer appeals, maintaining that the issue was a question of law for the judge to determine. We affirm.

The parties are familiar with the facts and we do not discuss them further.

## DISCUSSION

Normally, the statute of limitations begins to run from the date the tax return is filed with the IRS. *United States v. Habig*, 390 U.S. 222, 223, 88 S. Ct. 926, 19 L. Ed. 2d 1055 (1986). A tax return is "filed" when it is delivered to the IRS. *Emmons v. Commissioner*, 92 T.C. 342, 346 (1989), *aff'd*, 898 F.2d 50 (5th Cir. 1990).

When a tax return is timely mailed by the taxpayer but not timely received by the IRS, 26 U.S.C. § 7502 dictates that the tax return be deemed delivered on the date it was mailed. *First Charter Financial Corp. v. United States*, 669 F.2d 1342, 1346 (9th Cir. 1982). Under this accounting, the statute of limitations began to run on October 16, 1989, when Shildmyer mailed his return, and finished six years later on October 16, 1995.

However, the exception under section 7502, which allows the mailing date to be deemed the filing date, is inapplicable if the tax return is not timely mailed. "Section 7502(a) intended to make the date of mailing the date of delivery only where a document would otherwise be considered untimely filed." *First Charter*, 669 F.2d at 1346.

The government argues that the extension Shildmyer received was invalid because Shildmyer did not properly file for it (he allegedly failed to make a bona fide and reasonable estimate of his tax liability). Therefore, the government maintains that Shildmyer's tax return was due on April 15, 1989, not October 16, 1989, and thus Shildmyer's return mailed [sic] on October 16, 1989 was untimely. If the government is correct, the statute of limitations began to run on the date the tax return was actually received, October 18, 1989, and the indictment on count one is not barred by the statute of limitations. *See Habig*, 390 U.S. at 223 (holding that the six-year statute of limitations begins to run on the date the tax return was filed with the IRS when the tax return is filed after the April 15 deadline).[1]

A trial court's decision to deny a motion to dismiss an indictment based on decisions of law is reviewed de novo. *United States v. McClelland*, 72 F.3d 717, 721 (9th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1448, 134 L. Ed. 2d 567 (1996). The trial court's findings of fact with regard to a motion to dismiss an indictment are reviewed

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[1] *Haskell v. United States*, 241 F.2d 790 (10th Cir. 1957), cited by Shildmyer, is not to the contrary because *Haskell* involved a failure to file while the case at hand involves the filing of a false tax return. The act which constituted the commission of Shildmyer's offense was the return of the false tax return, which occurred later than the due date. *See United States v. Dahlstrom*, 713 F.2d 1423, 1429 (9th Cir. 1983) ("[T]he crime of fraudulent preparation of a tax return is 'committed a the [sic] time the return is filed.' " (quoting *Habig*, 390 U.S. at 223, 88 S. Ct. at 927)).

for clear error. *United States v. Armenta*, 69 F.3d 304, 306 (9th Cir. 1995).[2]

"A pretrial motion is generally 'capable of determination' before trial if it involves questions of law rather than fact.' " *United States v. Shortt Accountancy Corp.*, 785 F.2d 1448, 1452 (9th Cir.), (quoting *United States v. Korn*, 557 F.2d 1089, 1090 (5th Cir. 1977)), *cert. denied*, 478 U.S. 1007, 106 S. Ct. 3301, 92 L. Ed. 2d 715 (1986). "As the ultimate finder of fact is concerned with the general issue of guilt, a motion requiring factual determinations may be decided before trial if 'trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense.' " *Id.* (quoting *United States v. Covington*, 395 U.S. 57, 60, 89 S. Ct. 1559, 1561, 23 L. Ed. 2d 94 (1969)); *see United States v. Lunstedt*, 997 F.2d 665, 667 (9th Cir. 1993) ("A district court can only grant [a motion to dismiss] if it is entirely segregable from the evidence to be presented at trial." (quotation omitted)).

"Under this standard, the district court must decide the issue raised in the pretrial motion if it is 'entirely segregable' from the evidence to be presented at trial." *Shortt Accounting*, 785 F.2d at 1452 (quoting *United States v. Barletta*, 644 F.2d 50, 57-58 (1st Cir. 1981)). *See United*

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[2] The government points out that "[o]ur cases are divided as to the appropriate standard of review for a district court's denial of an appellant's motion to dismiss an indictment." *United States v. Lunstedt*, 997 F.2d 665, 667 (9th Cir. 1993). However, this conflict has occurred when the motion to dismiss involves the court's supervisory powers, which are not implicated here.

*States v. Nukida*, 8 F.3d 665, 669 (9th Cir. 1993). "[I]f an issue raised in a pretrial motion is not entirely segregatable [sic] from the evidence to be presented at trial, but also does not require review of a substantial portion of that evidence, the district court has discretion to defer decision on the motion." *Shortt Accountancy*, 785 F.2d at 1452.

Shildmyer's motion to dismiss required resolution of a factual issue: whether Shildmyer made a "bona fide and reasonable estimate of his tax liability" in filing his application for an automatic extension. The crime of which Shildmyer stood accused required the government to prove that Shildmyer "[w]illfully [made] and subscribe[d] any return, statement, or other document, . . . which he does not believe to be true and correct as to every material matter." 26 U.S.C. § 7206(1).

We find that the issue of Shildmyer's application for an automatic extension is not entirely segregable from the issue of Shildmyer's guilt under the charged crime because both involve inquiry into the extent of Shildmyer's tax liability. Neither in his briefs nor at oral argument did Shildmyer contend that a statute of limitations precluded the government from questioning the validity of the extension or the application on which it was based. The question presented was whether the extension request could lawfully be voided, which required a further factual inquiry which was intertwined with the facts at issue in the trial. Therefore, whether to decide the motion to dismiss prior to trial was a matter properly within the district court's discretion.

CONCLUSION

The judgment of the district court is AFFIRMED.

INTERNAL USE ONLY: Proceedings include all events.
96-30222 USA v. Shildmyer

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|---|---|
| UNITED STATES OF AMERICA<br>Plaintiff – Appellee | Joanne Rodriquez, AUSA<br>208-334-1211<br>[COR LD NTC aus]<br>OFFICE OF THE U.S. ATTORNEY<br>Box 32<br>Boise, ID 83707 |
| v. | |
| KYLE SHILDMYER<br>Defendant – Appellant | Lawrence Sirhall<br>208/342-2444<br>[COR LD NTC ret]<br>200 N 3rd Imperial Plaza #8<br>Boise, ID 83702 |

Docket as of April 17, 1997 0:30 am

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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|---|---|---|
| UNITED STATES OF AMERICA, Plaintiff-Appellee, v. KYLE SHILDMYER, Defendant-Appellant. | ) | No. 96-30222<br>D.C. No. CR-95-097-BLW<br>ORDER<br>(Filed Jun. 16, 1997) |

Before: WRIGHT, REINHARDT, and THOMAS, Circuit Judges.

The petition for rehearing is denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

| | | |
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| UNITED STATES OF AMERICA,<br>Plaintiff,<br><br>v.<br><br>KYLE G. SHILDMYER,<br>Defendant. | ) | Criminal No.<br>95-097-S-BLW<br><br><br>MEMORANDUM<br>DECISION AND<br>ORDER |

## INTRODUCTION

(Filed Feb. 6, 1996)

The Court has before it Defendant's Motion to Dismiss (Docket No. 14). The Court held oral argument on February 2, 1996, and the Motion is now at issue.

## ANALYSIS

On October 18, 1995, the Grand Jury returned a five count indictment against Defendant Shildmyer, charging him with subscribing to false tax returns. Count one of the indictment concerns his personal tax return for the year 1988. Shildmyer claims that count one is time-barred by 26 U.S.C. §6531, a statute of limitations requiring prosecution within six years.

Shildmyer mailed his 1988 tax return to the IRS on October 16, 1989. The IRS received that return on October 18, 1989. Six years later, to the very day, the Grand Jury returned the indictment against Shildmyer. If the six-year limitations period begins to run on the day the tax return was received by the IRS, count one of the indictment is

not time-barred. But if the limitations period begins to run on the date the return was mailed, count one is time-barred.

The six-year limitations period set by §6531 generally begins to run on the date the tax return is actually delivered to the Internal Revenue Service (IRS). *U.S. v. Habig*, 390 U.S. 222 (1968). But under some circumstances, set forth in 26 U.S.C. §7502, the date of mailing of the return could be deemed to be the date of delivery, and hence the six-year limitations period could begin to run from the date of mailing. *See, U.S. v. Robinson*, 811 F. Supp. 1174 (S.C.Miss. 1993). Section 7502 dictates that defendant's tax return be deemed "delivered" on the date it was mailed, rather than on the date it was received by the IRS, whenever the tax return was timely mailed by the taxpayer but not timely received by the IRS. *See, First Charter Financial Corp. v. U.S.*, 669 F.2d 1342 (9th Cir. 1982). If the tax return was not timely mailed by the taxpayer, §7502 is inapplicable. *Id.*

The threshold issue in this case is whether Shildmyer's mailing on October 16, 1989 was timely. If Shildmyer was late, he cannot invoke the protections of §7502.

Shildmyer's 1988 tax return was originally due on April 15, 1989. It is undisputed, however, that he filed an Application for Automatic Extension of Time to File U.S. Individual Income Tax Return, IRS Form 4868, on April 14, 1989. It is also undisputed that this Application was accepted by the IRS. *See*, Affidavit of Sirhall, exhibit A (Docket No. 16). This extension required Shildmyer to file his return on or before October 15, 1989. It is undisputed

that because October 15, 1989 fell on a Sunday, Shildmyer's filing date was automatically extended to October 16, 1989.

It is also undisputed that Shildmyer mailed his 1988 tax return on October 16, 1989. The Government concedes that §7502 would tytpically apply under these circumstances, and that a timely mailed return would be deemed "delivered" to the IRS on the date of mailing, not on the date of actual receipt. But the Government argues that §7502 is not applicable to this case because Shildmyer's Application for Extension of Time, Form 4868, was improper, and hence the due date for Shildmyer's 1988 return had never been properly extended past April 15, 1989. The Government asserts that because Shildmyer filed his 1988 return late, he is not entitled to the protections of §7502.

In support of this argument, the Government cites *Crocker v. Commissioner*, 92 T.C. 899 (1989). In that case, the Tax Court held that an extension granted by the IRS pursuant to a Form 4868 request by the taxpayer, would be void where the taxpayer did not properly estimate his tax liability on the Form 4868. The Tax Court held that the taxpayer must make a "bona fide and reasonable estimate of his tax liability based on the information available to him at the time he makes his request for extension." *Id.* at 908. If the estimate is improper, the extension is void *ab initio*, and the due date reverts back to April 15th of the relevant year. *Id.* at 910-12.

Shildmyer responds to *Crocker* by asserting that it is a civil Tax Court case that cannot apply to this criminal case. But Shildmyer is invoking the protections of §7502,

and thus must abide by an interpretation of that statute by the very Court vested with interpretive authority and expertise.

Shildmyer argues next that even if *Crocker* applies, the Government has failed to make the showing required by *Crocker* to void the extension of time. But this is not a civil summary judgment proceeding where the Government is required to come forward with evidence. The "Federal Rules of Criminal Procedure contain no provision for a motion for summary judgment or its equivalent." *U.S. v. Gulla*, 833 F. Supp. 274, 284 (S.D.N.Y. 1993). In fact, the question of the applicability of a statute of limitations in a criminal case is a question for the jury. *See, U.S. v. Walker*, 653 F.2d 1343, 1346 at n. 6 (9th Cir. 1981); *U.S. v. Oliva*, 46 F.3d 320, 324-25 (3rd Cir. 1995). Thus, the Government need not, at this stage of the proceedings, present any evidence. The issue must ultimately be resolved by the jury.

The Court will therefore deny Shildmyer's Motion to Dismiss. This denial is without prejudice to Shildmyer's right to move at the close of the Government's case-in-chief for a Judgment of Acquittal pursuant to Federal Rule of Criminal Procedure 29(a).

**ORDER**

In accordance with the views expressed in the Memorandum Decision above.

NOW THEREFORE IT IS HEREBY ORDERED, that the Defendant's Motion to Dismiss (Docket No. 14) be, and the same is hereby, DENIED.

DATED this 6th day of February, 1996.

/s/ B. Lynn Winmill
B. LYNN WINMILL
UNITED STATES DISTRICT COURT

United States District Court
for the
District of Idaho
February 6, 1996

* * CLERK'S CERTIFICATE OF MAILING * *

Re: 1:95-cr-00097

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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF IDAHO**

| | | |
|---|---|---|
| **UNITED STATES OF AMERICA,** | ) | |
| | ) | **Criminal Nos.** |
| **vs.** | ) | **95-097-S-BLW** |
| **KYLE G. SHILDMYER,** | ) | |
| | ) | **PLEA** |
| **Defendant.** | ) | **AGREEMENT** |

Pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure, the undersigned Assistant United States Attorney for the District of Idaho, and Lawrence G. Sirhall, Jr., attorney for the defendant, have engaged in discussions and have reached an agreement which contemplates the entry of a plea of guilty to Count One of the Indictment herein.

1. Upon acceptance of such plea of guilty, the attorney for the government agrees that the defendant may enter a conditional plea, reserving the right to appeal the denial of his Motion to Dismiss. The defendant specifically reserves the right to raise on appeal all factual and legal issues in his motion to dismiss. The attorney for the

government also agrees to move to dismiss the remaining counts in the Indictment.

2. The defendant understands that the sentence to be imposed rests with the sole discretion of the Court which will not be bound by the recommendations of the United States Attorney or the defendant and his counsel.

3. The elements of 26 U.S.C. § 7206(1) are that: (1) the defendant signed or caused to be signed a return that was false as to a material matter, (2) the return contained a written declaration that it was made under penalties of perjury, (3) the defendant did not believe the return to be true and correct as to every material matter; and (4) the defendant falsely subscribed to the return willfully, with the specific intent to violate the law.

4. The defendant states that he is aware of his absolute right to plead not guilty and persist in that plea; that he has a right to be tried by a jury and at that trial he has a right to the assistance of counsel. At trial, he has a right to require the government to prove the entire case against him beyond a reasonable doubt, that he has the right not to testify against himself or not to be compelled to incriminate himself. Further, at trial, he would have the right to confront and cross-examine witnesses in his own behalf.

5. Defendant understands that by pleading guilty he waives the right to trial by jury, that no trial will, in fact, occur and that the only thing remaining to be done in this case is the hearing at the time and date set for sentencing at which only matters concerning the nature of the sentence to be imposed by the Court are to be heard and decided by the Court.

6. Defendant also states to the Court that he is aware of the maximum penalty that could be imposed of three (3) years in prison and/or a fine of $250,000, plus a $50.00 special assessment.

7. The defendant states that this agreement constitutes the entire agreement between the defendant and the government and that no other promises or inducements have been made, directly or indirectly, by any agent of the United States, including any Assistant United States Attorney, concerning any plea to be entered in this case. In addition, the defendant states that no person has, directly or indirectly, threatened or coerced the defendant to do, or refrain from doing anything in connection with any aspect of this case including entering a plea of guilty.

8. Counsel for the defendant states that he has read this agreement; has been given a copy of the agreement for his file; has explained said agreement to his client, and states that, to the best of his knowledge and belief, the defendant understands this agreement.

9. The defendant states that he has read this agreement; has had said agreement read to him; has discussed said agreement with his attorney and understands this agreement.

DATED: 3/25/96 /s/ Kyle G. Shildmyer
KYLE G. SHILDMYER
Defendant

DATED: 3/27/96 /s/ Lawrence G. Sirhall, Jr.
LAWRENCE G. SIRHALL, JR.
Attorney for Defendant

BETTY H. RICHARDSON
United States Attorney

DATED: 3/29/96 /s/ Joanne Rodriguez
JOANNE P. RODRIGUEZ
Assistant United States
Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the United States Attorney's Office for the District of Idaho, and that a conformed copy of the foregoing PLEA AGREEMENT was mailed, postage prepaid, to all parties named below, this 3rd day of April, 1996.

Mr. Lawrence G. Sirhall, Jr.
Attorney at Law
Imperial Plaza
200 N. 3rd, Ste. 8
P.O. Box 1112
Boise, Idaho 83701

/s/ Rebecca J. Hartley

*BETTY H. RICHARDSON*
*UNITED STATES ATTORNEY*
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*BOISE, IDAHO 83707*

*UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO*

| | |
|---|---|
| UNITED STATES OF AMERICA,<br><br>vs.<br><br>KYLE G. SHILDMYER,<br><br>Defendant. | Criminal No. 95-097-S-BLW<br><br>GOVERNMENT'S OPPOSITION TO MOTION TO DISMISS<br><br>(Filed Jan. 12, 1996) |

COMES NOW Joanne P. Rodriguez, Assistant United States Attorney for the District of Idaho, with this Opposition to Defendant's Motion to Dismiss.

Shildmyer argues that the statute of limitations ran on Count 1 of the Indictment on October 16, 1995, two days before the Indictment was returned. The basis of the argument is Title 26, United States Code, Section 7502(a)(1).

As Shildmyer points out, a return is generally considered filed (the critical date for criminal prosecution) when it is delivered to the Internal Revenue Service.

Section 7502 provides an exception to this rule. This Circuit has ruled that this exception applies to filing extensions authorized by 26 U.S.C. § 6081, as Shildmyer also noted. *First Charter Financial Corp. v. United States*, 669 F.2d 1342, 1346 (9th Cir. 1982).

Shildmyer obtained extensions to file his return by October 16, 1989. The mailing envelope shows that the return was mailed on that date. The return itself was received by the I.R.S. on October 18, 1989. That is then the filing date, unless Section 7502(a)(1) applies to Shildmyer. As explained below, it does not.

Extensions to file are authorized by 26 U.S.C. § 6081(a). Title 26, Code of Federal Regulations, Section 1.6081-4 specifically addresses the automatic extension that Shildmyer obtained. In pertinent part, the regulation provides:

> § 1.6081-4(A) In general (1) – An individual who is required to file an income tax return on Form 1040 for any taxable year ending on or after December 31, 1982, shall be allowed an automatic extension of time to file such return after the date prescribed for filing of the return only if the requirements contained in subparagraphs (2), (3), and (4) of this paragraph are met.

Subparagraph (4) of § 1.6081-4(a) reads as follows:

> (4) Such application for extension must show the full amount properly estimated as tax for such taxpayer for such taxable year, and such application must be accompanied by the full remittance of the amount properly estimated as tax which is unpaid as of the date prescribed for filing of the return.

In Shildmyer's case, the first application for extension showed an estimated tax of $3,828.00. Shildmyer claimed to have withholding credits of $4,069.00, and thus made no remittance with the request for extension. In fact, Shildmyer's income tax liability was $78,305.03 for 1988. Thus, he "underestimated" his liability by more than twenty times (2,000%) and made no remittance of this amount.

The United States Tax Court has held that such automatic extensions that were obtained without properly estimating the amount of tax due on the later-to-be-filed tax returns were invalid and void *ab initio*. *Crocker v. Commissioner*, 92 T.C. 899, 905, 910-912 (1989) (copy attached). The two extensions in question in *Crocker* involved estimations that were twenty percent and fifty percent of the tax ultimately determined to be owing. Shildmyer's understating his liability by 2,000 percent should also be deemed to be an improper estimation, invalidating his extension.

*Crocker* is instructive on three important points:

1. When the extension was ultimately deemed invalid, the due date of the return reverted back to the initial April 15th date;

2. The I.R.S. took no administrative action in *Crocker* to invalidate the extension when it was found to be defective. It merely issued a Statutory Notice of Deficiency asserting a late filed return penalty. Thus, in Shildmyer's case, no administrative action was necessary to invalidate or void Shildmyer's extension. When both the mailing and the actual receipt are beyond the due date of

the return, Section 7502(a)(2) does not apply to automatically make the mailing date the filed date. In the absence of the application of 26 U.S.C. § 7502, which Shildmyer relies upon, the date of filing is the date of receipt in the Ogden Service Center, October 18, 1989.

3. *Crocker* and is progeny all dealt with the fact patterns where the taxpayers had as a state of mind, at worst, a lack of a "bona fide and reasonable attempt to locate, gather, and consult information which will [would] enable him [them] to make a proper estimate of his tax liability. *Crocker,* 92 T.C. at 908. In cases where the government has lost this issue, the court found that the taxpayers had made a bona fide and reasonable attempt to locate, gather, and consult information which would enable them to make a proper estimate of their tax liability. See, e.g. *Hudspeth v. Commissioner,* T.C. Memo 1985-628, *aff'd in part and revd. and remanded in part* (without discussion of this issue), 914 F.2d 1207 (9th Cir. 1990); *Perry v. Commissioner,* T.C. Memo 1990-228; and *Cannata v. Commissioner,* T.C. Memo 1990-502.

In contrast to these taxpayers, the evidence against Mr. Shildmyer at trial will show a willful attempt to incorrectly state his income tax liability both before and after the request for extension was requested. As previously stated, the prosecution intends to prove at trial that Mr. Shildmyer willfully understated his tax liability on the Application for Extension by over 2,000%.

Thus, Shildmyer did not make a bona fide and reasonable attempt to locate, gather, and consult information which would enable him to make a proper estimate of his tax liability, as required by *Crocker.* Therefore, the 1988

automatic extension would be invalid and void *ab initio*. No administrative action was necessary to invalidate or void Shildmyer's extension. When both the mailing and the actual receipt are beyond the due date of the return, Section 7502(a)(2) does not apply to make the mailing date of the 1988 tax return the date it was filed date. The date of filing is then the date of receipt in the Ogden Service Center, October 18, 1989. Thus, the indictment on October 18, 1995, is within the six year statute of limitations contemplated by 26 U.S.C. § 6531.

Shildmyer might argue that he delegated the duty to make a proper estimate of his tax liability to Mr. Nieves, his accountant. *United States v. Boyle*, 469 U.S. 241 (1985), does not permit a principal to delegate duties and responsibilities with respect to filing returns and observing due dates to another. Thus, Shildmyer's knowledge of his tax situation at the time the extension was requested would be imputed to his agent in requesting the extension.

Shildmyer may also argue that the second extension granted in August of 1989 extended the due date of the 1988 return. The validity of this latter extension, however, is predicated on the validity of the first extension. 26 C.F.R. § 1.6081-1(b) provides that the latter extension must be obtained before the due date of the tax return. With the voiding of the first automatic extension, the August extension was requested nearly four months after the tax return was due. Further, the August extension request did not comport with 26 C.F.R. § 1.6081-1(b)(2) because it lacked a filing history for the three immediately prior years, and made no statement as to estimated taxes paid or withheld for 1988. *See generally United States v. Phillips*, 843 F.2d 438, 442 (11th Cir. 1988).

Thus, the second extension from August 15 to October 16 would be a nullity as well.

Without seeing the evidence at trial, this Court cannot make an evaluation of the government's assertion as to what that evidence would show. Therefore, the Court could deny this motion without prejudice, allowing Mr. Shildmyer to renew it at the close of the trial, or take it under advisement until the completion of the trial.

Respectfully submitted this 12th day of January, 1996.

BETTY H. RICHARDSON
United States Attorney

/s/ Joanne P. Rodriguez
Joanne P. Rodriguez
Assistant United
States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee in the office of the United States Attorney; that a true and correct copy of the foregoing Government's Opposition to Motion to Dismiss was faxed, hand delivered or mailed by United States mail, postage prepaid, this 12th day of January, 1996.

Lawrence G. Sirhall, Jr.
Attorney at Law
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/s/ Rebecca J. Ebling

LAWRENCE G. SIRHALL, JR.
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Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

(Filed Jan 2, 1996)

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff,<br>vs.<br>KYLE SHILDMYER,<br>Defendant. | 95-97-S-BLW<br>Civil Case No.<br>CR-95-045-S-BLW<br><br>MOTION TO<br>DISMISS |

COMES NOW the Defendant, Kyle Shilddmyer [sic], by and through his attorney of record, Lawrence G. Sirhall, Jr., pursuant to Rule 12 of the Federal Criminal Rules, and moves this Court for an Order dismissing Count One of the Indictment handed down on October 18, 1995. This motion is made upon the grounds that the statute of limitations, Internal Revenue Code §6531, bars prosecution of the offense charged in Count One of the Indictment.

This Motion is supported by the Memorandum and Affidavit of Lawrence G. Sirhall, Jr., filed herewith. Defendant will call his Motion on for hearing.

DATED this 2nd day of January 1996.

/s/ Lawrence G. Sirhall, Jr.
LAWRENCE G. SIRHALL, JR.
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby Certify that a true and correct copy of the foregoing document was mailed to the following persons by first class mail, postage prepaid, on this 2nd day of January 1996:

Joanne P. Rodriguez
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/s/ Lawrence G. Sirhall, Jr.

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Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO
(Filed Jan 2, 1996)

| | |
|---|---|
| UNITED STATES OF AMERICA, Plaintiff, vs. KYLE SHILDMYER, Defendant. | Civil Case No. CR-95-045-S-BLW<br>MEMORANDUM IN SUPPORT OF MOTION TO DISMISS |

## I) INTRODUCTION

On October 18, 1995, the Grand Jury, in and for the District of Idaho, returned a five count Indictment against Defendant Kyle Shildmyer, (hereinafter referred to as "Defendant") charging him with subscribing to false tax returns. Count One involves his personal tax return for the year 1988. Because the Indictment was returned more than 6 years after the return was delivered to the Internal Revenue Service, Internal Revenue Code § 6531 bars prosecution for the year 1988 and, therefore, Count One must be dismissed.

## II) ANALYSIS

### A) FACTUAL BACKGROUND

On April 14, 1989, Defendant's agent, R. Randolph Nieves, on Defendant's behalf, filed an Application for Automatic Extension of Time to File U.S. Individual Income Tax Return for the year 1988. Paragraph 2 of Lawrence G. Sirhall, Jr., Affidavit dated January 2, 1996. This Extension was timely and accepted by the Service.

On October 16, 1989, a Monday, Defendant caused his 1988 individual income tax return to be deposited in the United States mail, postage prepaid, and sent to the Ogden Service Center. The envelope was postmarked October 16, 1989. Paragraph 2 of Lawrence G. Sirhall, Jr., Affidavit dated January 2, 1996. Consequently, this return was timely filed. Transcript of Grand Jury Testimony, Case Number S-95-0115, Pg. 30, Ln. 2-20. Defendant's 1988 individual income tax return was physically received by the Ogden Service Center on October 18, 1989. Paragraph 2 of Lawrence G. Sirhall, Jr., Affidavit dated January 2, 1996. Then, six years and two days later, on Wednesday, October 18, 1995, an Indictment was issued charging Defendant with, among other things, willfully subscribing to a false income tax return – his 1988 individual income tax return.

### B) APPLICABLE LAW

Internal Revenue Code §6531 provides a 6 year period of limitations for offenses described in I.R.C. §7206(1). The periods of limitation on criminal prosecutions are to be determined in the same manner and under the same rules applicable in determining when returns

are deemed to have been filed in civil matters. I. R. C. §6531.

The Ninth Circuit adheres to the principle that criminal limitations statutes are to be liberally interpreted in favor of repose. *United States v. Ricon-Jiminez*, 595 F.2d 1192, 1193 (9th Cir. 1979). Consequently, the statute of limitations normally begins to run when the crime is complete. *Id.*

Crimes relating to allegedly false income tax returns are committed at the time the return is filed. *United States v. Habig*, 390 U.S. 222, 222-223 (1967). While taxpayers may argue that the mailing date constitutes the filing date, this is not the general rule. The filing date is the date of the return's delivery to the Internal Revenue Service. However, a statutory exception to this rule exists.

Internal Revenue Code § 7502(a)(1) provides that where a return is delivered by United States Mail to the Service after the due date, the postmark on the cover of the mailing document shall be deemed the date of delivery. In other words, Section 7502 only applies where a document is delivered to the Service after the last date prescribed for filing. As interpreted by the Ninth Circuit, "[s]ection 7502(a) intended to make the date of mailing the date of delivery only where a document would otherwise be considered untimely filed. Section 7502(a)(1) 'is sufficiently broad to include a period or date for filing

prescribed by the Commissioner under authority of section 6081'[1] (citations omitted)." *First Charter Financial Corp., v. United States*, 669 F.2d 1342, 1346 (9th Cir. 1982).

Applying these principles of law to the facts at hand, Count One of the indictment is beyond the 6 year statute of limitations prescribed by I.R.C. §6531. Defendant timely filed a Request for Extension on April 14, 1989. The Service granted this extension request which meant that Defendant had until October 15, 1989, to timely file has 1988 individual income tax return. Since October 15, 1989, fell on a Sunday, Defendant had until Monday, October 16, 1989. Defendant mailed his return on this date and the letter bears a United States Postmark verifying this fact. Because Defendant's return would otherwise be untimely-received by the Service after the last day prescribed for filing the return (October 16, 1989), Section 7502(a)(1) applies and Defendant's return is deemed delivered on October 16, 1989.

## III) CONCLUSION

Wherefore, Defendant respectfully requests that this Court grant Defendant's Motion and dismiss Count One of the Indictment because more than 6 years has elapsed since the date the return was filed and the Indictment issued.

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[1] Section 6081 authorizes an extension of time for filing returns.

DATED this 2nd day of January 1996.

LAWRENCE G. SIRHALL, JR.
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby Certify that a true and correct copy of the foregoing document was mailed to the following persons by first class mail, postage prepaid, on this 2nd day of January 1996:

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